

IN THE COURT OF APPEALS 06/04/96

OF THE

STATE OF MISSISSIPPI

NO. 94-KA-00422 COA

TIMOTHY GEE

APPELLANT

v.

STATE OF MISSISSIPPI

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND
MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. GRAY EVANS

COURT FROM WHICH APPEALED: LEFLORE COUNTY CIRCUIT COURT

ATTORNEY(S) FOR APPELLANT:

K. ELIZABETH DAVIS

ATTORNEY(S) FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: W. GLENN WATTS

DISTRICT ATTORNEY(S): NOEL CROOK

NATURE OF THE CASE: SALE OF COCAINE

TRIAL COURT DISPOSITION: CONVICTION AND SENTENCE OF THIRTY (30) YEARS,
WITH SIX (6) YEARS SUSPENDED, IN THE MDOC

BEFORE THOMAS, P.J., KING, AND PAYNE, JJ.

PAYNE, J., FOR THE COURT:

Timothy Gee was indicted and convicted of the sale of cocaine. The court sentenced him to serve thirty years, with six years suspended, in the Mississippi Department of Corrections. The court denied Gee's motion for JNOV or, in the alternative, a new trial. We find that Gee's issues on appeal have no merit and therefore affirm.

FACTS

On the evening of June 12, 1993, undercover agent Alvin Helms of the North Central Narcotics Task Force and confidential informant Pearl Williams were working in Greenwood. Helms testified that they saw an individual that Williams recognized, and later identified as Timothy Gee, standing in the street. Helms called him over to the undercover vehicle and asked him where he could find a twenty dollar piece. Gee reached into his pocket, pulled out a plastic container, poured one rock of crack cocaine into his own hand, and gave Helms the rock in exchange for twenty dollars of Task Force money. A surveillance video camera inside the vehicle videotaped the transaction. Gee was later arrested in a roundup of illegal drug sellers.

Williams testified that she had seen Gee around town on numerous occasions and that he was the individual who sold crack to Helms. Leflore County Deputy Sheriff J. B. Henry testified that he arrested Gee in June 1993, and had known Gee for about six years from living in the same neighborhood. Henry stated that he viewed the videotape and identified Gee as the individual on the tape who had made the crack sale. Charles Terry of the Mississippi Crime Lab in Jackson testified that the narcotic sold by Gee to Helms was cocaine.

Gee testified in his own defense that he did not remember the exact day, but that he had been helping to build apartment houses in Oxford as a brick mason for Floyd Melton. He stated that he did not sell crack to Helms, and denied that he was the individual on the videotape. He said he knew the individual on the tape but not by name. Gee denied that he was the person on the videotape. Floyd Melton testified as a rebuttal witness for the State that he was the owner of the Oxford apartment construction project. His employment, time sheet, and payroll records showed that Gee was not employed or paid for the months of May, June, and July 1992.

Gee moved for a directed verdict at the end of the State's case, and the court denied the motion. The jury found Gee guilty of the sale of crack cocaine, and the court sentenced him to a term of thirty years, with six years suspended, in the Mississippi Department of Corrections. The court subsequently denied Gee's motion for a new trial or JNOV. Gee now appeals the jury's verdict.

ANALYSIS

I. DID THE TRIAL COURT ERR BY REFUSING TO GRANT GEES'S MOTION FOR DIRECTED VERDICT AT THE END OF THE STATE'S CASE, BY REFUSING TO GRANT HIS PEREMPTORY INSTRUCTION, OR BY FAILING TO GRANT HIS MOTION FOR A NEW TRIAL OR JNOV?

Gee contends that the identification evidence against him was considerably doubtful, and was

insufficient to establish guilt beyond a reasonable doubt. He argues that the evidence lacked both sufficiency and weight. He stated at trial that he weighed 220 to 230 pounds and was five-feet-five in height, he had weighed at least 200 pounds since the eighth grade, he had not lost or gained weight or height within the last two years prior to the trial, and he had been short and overweight all his life. Gee said that he had renewed his driver's license in Oxford in 1992, and that the license showed his weight to be 220 pounds. He also stated that he had walked with a limp all his life because he was born with bad legs and a club foot. Gee contended that he was not the individual who had sold crack cocaine to Helms because Helms's post-sale report described the seller as weighing 155 to 165 pounds and being five-foot-seven to five-foot-ten in height. He argues that Helms's report failed to mention any physical abnormality, such as a limp which was clearly characteristic of himself. Gee testified that he was not the individual on the videotape. He stated that he knew the individual by face, and that the person had a slight limp, but that he did not know his name.

Finally, Gee contends that Deputy Henry was not personally acquainted with him, and argues that Henry confused Gee with Gee's brother, Trent. He believes that Henry subsequently identified Gee by viewing the videotape of the sale. He stated that Henry actually went to arrest Trent Gee, not Timothy. He argues that the videotape conforms exactly to the post-sale report of the seller, but not to his own physical features. He states that task force funds were never recovered, nor were fingerprints taken from the crack cocaine container. Gee contends that the State's identification evidence leaves considerable doubt as to his guilt.

Gee's arguments regarding the denial of his motion for directed verdict, request for peremptory instruction, and motion for JNOV challenge the legal sufficiency of the evidence against him. Where a defendant asserts that evidence was insufficient for a conviction and thereby challenges the legal sufficiency of that evidence, the authority of an appellate court to interfere with the jury's verdict is quite limited. *Williams v. State*, 667 So. 2d 15, 23 (Miss. 1996) (citation omitted). "The standard for reviewing a denial of a directed verdict and a peremptory instruction is the same as that for a denial of a judgment notwithstanding the verdict." *Tait v. State*, 669 So. 2d 85, 88 (Miss. 1996) (citing *Alford v. State*, 656 So. 2d 1186, 1189 (Miss. 1995)). "On appeal, this Court reviews the lower court's ruling when the legal sufficiency of the evidence was last challenged." *Id.* (citing *Smith v. State*, 646 So. 2d 538, 542 (Miss. 1994)); *see also McClain v. State*, 625 So. 2d 774, 778 (Miss. 1993) (sufficiency challenges require consideration of the evidence before the court when made, so that appellate court must review ruling on the last occasion the challenge was made at the trial level). This occurred when the trial court overruled Gee's motion for JNOV. The Mississippi Supreme Court has stated that the standard of review regarding a challenge of the sufficiency of the evidence is well established:

[T]he [sufficiency of the evidence] as a matter of law is viewed and tested in a light most favorable to the State. The credible evidence consistent with [Gee's] guilt must be accepted as true. The prosecution must be given the benefit of all favorable inferences that may be reasonably drawn from the evidence. Matters regarding the weight and credibility of the evidence are to be resolved by the jury. We are authorized to reverse only where, with respect to one or more of the elements of the offense charged, the evidence so considered is such that reasonable and fair-minded jurors could only find the accused not guilty.

Jones v. State, 669 So. 2d 1383, 1388 (Miss. 1995) (quoting *McClain*, 625 So. 2d at 778); *see also Tait*, 669 So. 2d at 88; *Williams*, 667 So. 2d at 23.

In the present case, the evidence was legally sufficient to find that Gee was the individual who sold crack cocaine to Agent Helms. Helms testified without a doubt that the person from whom he bought crack cocaine was Gee. He testified to making his post-sale report, and stated that Gee appeared to have gained a lot of weight since that time. He said that, when he made his report, he had estimated Gee's physical attributes. He testified that he remembered Gee's limp and light brown eye color, and agreed on cross-examination that his report did not contain any notation regarding Gee's limp. Finally, he stated that there was no question in his mind that the person in the videotape was Gee, and was also the individual who had sold him crack cocaine.

Williams testified that she had seen Gee around Greenwood for a year or two, but did not know his name. She stated that he appeared to have gained a little weight since 1992. She positively identified Gee as the individual who sold cocaine to Helms. Deputy Henry testified that he had known Gee for about six years from living in the same neighborhood and from seeing him around town. He stated that Gee appeared to have added some body weight since 1992, and that he walked with a limp. He positively identified Gee both from the videotape prior to Gee's arrest and at trial. Henry said that he had previously confused their names, Timothy and Trent, but not the individuals themselves because he knew that Timothy walked with a limp and was a lot larger in size than his brother Trent. Finally, forensic scientist Charles Terry testified that the substance that Helms said he had bought from Gee was crack cocaine.

Gee testified that he did not sell crack cocaine to Agent Helms. He stated that he was in Oxford working on apartment-house building projects during the time that Helms and Williams testified that the sale took place. Rebuttal witness, Floyd Melton, testified that Gee was not on the employment or payroll records during that same time period.

Here, the evidence consistent with the guilty verdict must be accepted as true. *Id.* Considering the elements of the crime along with all the evidence in the light most favorable to the verdict, the evidence is not such that reasonable jurors could only find Gee not guilty. The evidence in this case was clearly legally sufficient to support the conclusion that Gee sold crack cocaine to Agent Helms. Identification testimony from two State's witnesses clearly and directly implicated Gee in the sale. Testimony from Deputy Henry indicated that he knew Gee by face and by his limp. Henry stated unequivocally that he had identified Gee as the individual on the videotape. The fact that task force funds were never recovered is irrelevant, particularly in light of the eyewitness testimony, and the fact that Gee's arrest took place almost a year after the sale. Moreover, the lack of fingerprints is likewise irrelevant in light of the direct eyewitness testimony. We believe that the evidence was clearly sufficient to support the jury verdict that Gee sold crack cocaine to Agent Helms. The evidence was likewise amply sufficient to support the trial court's denial of Gee's motion for directed verdict, request for peremptory instruction, and post-trial motion for JNOV.

Gee also contends that the jury verdict was against the overwhelming weight of the evidence and requests a new trial. The Mississippi Supreme Court has stated that when an appellate court considers whether a jury verdict is against the overwhelming weight of the evidence, it must accept as

true all evidence favorable to the state and supportive of the verdict. *Ellis v. State*, 667 So. 2d 599, 611 (Miss. 1995) (citing *Isaac v. State*, 645 So. 2d 903, 907 (Miss. 1994)). Reversal is justified when the appellate court determines that an abuse of discretion existed in the lower court's denial of a new trial. *Id.*; see also *Eakes v. State*, 665 So. 2d 852, 872 (Miss. 1995) (citations omitted). The court has also held that "[t]he jury is charged with the responsibility of weighing and considering the conflicting evidence and credibility of the witnesses and determining whose testimony should be believed." *McClain*, 625 So. 2d at 781 (citations omitted); see also *Burrell v. State*, 613 So. 2d 1186, 1192 (Miss. 1993) (witness credibility and weight of conflicting testimony are left to the jury); *Kelly v. State*, 553 So. 2d 517, 522 (Miss. 1989) (witness credibility issues are to be left solely to the province of the jury). Furthermore, "the challenge to the weight of the evidence via motion for a new trial implicates the trial court's sound discretion." *McClain*, 625 So. 2d at 781 (citing *Wetz v. State*, 503 So. 2d 803, 807-08 (Miss. 1987)). The decision to grant a new trial "rest[s] in the sound discretion of the trial court, and the motion [for a new trial based on the weight of the evidence] should not be granted except to prevent an unconscionable injustice." *Id.*

In the present case, the jury heard the witnesses for and the evidence presented by both the State and the defense. The State's evidence showed that Gee was the individual who had sold crack cocaine to Agent Helms. However, Gee denied selling anything to Helms, and stated that he was in Oxford at the time. Gee's testimony was clearly for the jury to evaluate. The jury's decision to believe the State's evidence and witnesses was well within its discretion. Moreover, the jury was well within its power to weigh the evidence and the credibility of the witnesses' testimony and to convict Gee. The jury verdict was not so contrary to the overwhelming weight of the evidence that, to allow it to stand, would have been to promote an unconscionable injustice. The trial court did not abuse its discretion by refusing to grant Gee a new trial based on the weight of the evidence. The trial court properly denied Gee's motion for a new trial.

CONCLUSION

Finding no error, we affirm the jury's verdict and the court's sentence.

THE JUDGMENT OF THE CIRCUIT COURT OF LEFLORE COUNTY OF CONVICTION OF THE SALE OF COCAINE AND SENTENCE OF THIRTY (30) YEARS, WITH SIX (6) YEARS SUSPENDED, IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO LEFLORE COUNTY.

FRAISER, C.J., BRIDGES AND THOMAS, P.JJ., BARBER, COLEMAN, DIAZ, KING, McMILLIN, AND SOUTHWICK, JJ., CONCUR.